

claims
LBR 3001-1.A.1.d
11 U.S.C. § 501(c)
11 U.S.C. § 502(b)(9)
11 U.S.C. § 326
trustee's fees

In re Rovig, Case No. 397-36652-elp7

4/20/99

ELP

unpublished

When the trustee learned that there were surplus assets in the estate, he trustee sent a letter to all scheduled creditors who had not filed timely claims, notifying them of the surplus assets and that he would hold the case open to allow the late filing of claims. The trustee's action in sending the letter was not improper, because the trustee could have asked the court to send a surplus asset notice pursuant to LBR 3001-1.A.1.d, or could have filed claims on the creditor's behalf pursuant to § 501(c). The claims filed by the creditors after the claims bar date are not disallowed because they are late. § 502(b)(9). The lateness of claims filed after the deadline for filing affects their distribution priority rather than their allowability.

The trustee's fees cannot exceed percentages of funds disbursed by the trustee to parties other than the debtor. § 326. Funds disbursed include payments made to creditors, including creditors who filed late claims.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
STACIE LEE ROVIG,) 397-36652-elp7
Debtor.) MEMORANDUM OPINION

Kenneth S. Eiler, trustee of Chapter 7 debtor, Stacie Lee Rovig, notified creditors who did not file claims by the claims bar date that he had \$45,000 available for distribution and only \$8,830 in claims had been filed. His letter encouraged the recipient creditors to file claims and several did so. Debtor objects to the trustee's final account on the basis that the trustee acted improperly when he sent the letter and objects to distribution to creditors who filed late claims following the allegedly improper letter. For the reasons discussed hereafter, debtor's objections are overruled.

FACTS

When debtor filed her Chapter 7 bankruptcy in 1997, one of the assets she listed on her schedules was a personal injury claim arising from an assault ("the claim"), which debtor valued at \$1,000

1 and claimed was fully exempt. Shortly after the filing, the
2 bankruptcy court clerk sent notice of the filing to debtor's
3 creditors and advised them not to file a claim unless they received
4 further notice from the court to do so. The notice indicated that
5 it appeared there were no assets in debtor's estate from which
6 payment could be made to unsecured creditors.

7 Ultimately, the trustee settled the claim for \$160,000. From
8 the proceeds, the trustee paid his counsel (\$53,333), the costs of
9 the litigation (\$8,960), and \$54,000 to debtor which consisted of
10 \$10,000 for her exemption plus \$44,000 for the amount received in
11 excess of projected claims. The trustee retained approximately
12 \$45,000 to pay the costs of administration and the creditors'
13 claims.

14 On June 25, 1998, the clerk notified interested parties that
15 the trustee expected to be able to pay a dividend to creditors and
16 that claims had to be filed within ninety days thereafter in order
17 to be timely. The notice further stated: "Claims may be filed after
18 the stated deadline, but they probably will be treated as late and
19 therefore paid after timely claims"

20 When the trustee reviewed the filed claims shortly after the
21 September 23, 1998 claims deadline, he learned that only \$8,830 in
22 claims had been filed even though debtor had scheduled \$27,713 in
23 unsecured claims on her Schedule F.¹ On October 6, 1998, the
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25 ¹ According to Exhibit C to debtor's petition, debtor had
26 \$31,298 in unsecured debt. Debtor's schedules do not include any
(continued...)

1 trustee mailed a letter to each of the scheduled creditors who had
2 not filed a timely claim that said:

3 I am the bankruptcy trustee in the above entitled
4 proceeding which was commenced on August 13, 1997. To
5 date, I have collected over \$45,000 available for
6 distribution to creditors. Notice has been sent to
7 creditors to file claims. **However**, as of this date I have
8 received only \$8,830 in claims. If you do not file a
9 claim then I will have no alternative but to return a
10 substantial sum to the debtor.

11 I am prepared to leave this case open for an
12 additional thirty (30) days to allow you to file a proof
13 of claim. If you have any questions please contact me
14 immediately. Your claim form should be filed with the
15 U. S. Bankruptcy Court. Their address is: **1001 SW Fifth**
16 **#900, Portland, Oregon 97204**. Be sure to attach
17 documentation supporting your claim. Thank you.

18 (Emphasis in original).

19 Thereafter, five additional creditors filed claims totaling
20 \$11,655.57.

21 ISSUES

- 22 1. Whether the trustee acted improperly in mailing the
23 letter.
- 24 2. Whether claims filed after the trustee mailed the
25 letter should be disallowed.
- 26 3. How much compensation should be awarded to the trustee.

21 ANALYSIS

22 A. Propriety of the Letter.

23 Before 1996, when the amount of assets held by a trustee
24

25 ¹(...continued)
26 priority unsecured debt. There is no apparent explanation for the
discrepancy between Exhibit C and Schedule F.

1 exceeded filed claims, the court notified interested parties of the
2 surplus and notified creditors of the opportunity to file claims.²
3 In 1996, the national rule regarding surplus asset notices was
4 eliminated.

5 Thereafter, in 1998, the Bankruptcy Court for the District of
6 Oregon amended Local Bankruptcy Rule 3001-1.A.1.d³ to provide that
7 the court may send a surplus asset notice if the trustee requests
8 such a notice and demonstrates "cause." General Order 98-1.2. The
9 background of the 1996 amendment and the amendment of the related
10 Local Bankruptcy Rule are set forth in greater detail in my
11 unpublished opinion in In re Williams, No. 397-36061-elp7 (Bankr. D.
12 Or., June 11, 1998), a copy of which is attached.⁴

13 Rather than incur the expense and uncertain outcome of a
14

15 ² Former Fed. R. Bankr. P. 3002(6) provided:

16 In a chapter 7 liquidation case, if a surplus remains
17 after all claims allowed have been paid in full, the
18 court may grant an extension of time for the filing
 of claims against the surplus not filed within the
 time hereinabove prescribed.

19 ³ Local Bankruptcy Rule 3001-1.A.1.d. provides:

20 If a trustee concludes a case has surplus
21 assets, the trustee may file a motion for
22 authorization to send notice of such surplus to
 creditors who have not filed a claim. The court may
23 then, for cause shown in an individual case,
 authorize the clerk to send a surplus asset notice in
24 that case. If such notice is authorized, and is sent
 after the filing deadline for tardy claims set forth
25 in LBR 3001-1.A.1.c., the deadline for filing tardy
 claims shall become that set in the notice.

26 ⁴ The Williams opinion incorrectly cites the pertinent Local
Bankruptcy Rule as 3002, rather than 3001.

1 motion to have the court send a surplus asset notice, some trustees,
2 with the encouragement of the United States Trustee, began pursuing
3 alternative courses of conduct. For instance, some trustees, using
4 their statutory authority under 11 U.S.C. § 501(c),⁵ file claims on
5 behalf of creditors. See In re Martin, No. 698-62706-FRA7 (Bankr.
6 D. Or., February 12, 1999) (Alley, J.) (unpublished) (Fed. R. Bankr.
7 P. 3004 requires that claims filed by a trustee on behalf of a
8 creditor be filed no later than 30 days after the claims bar date,
9 therefore, claims filed by the trustee after that deadline were
10 disallowed as untimely.).

11 When the trustee realized that several creditors had not
12 filed claims in this case, he could have simply filed claims on
13 their behalf under § 501(c). Instead, before his deadline to file
14 claims on behalf of the creditors, he wrote to them and suggested
15 that they file claims. Under the distribution provisions of
16 § 726(a)(3)⁶, such claims, while late, would be paid before the

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18 ⁵ 11 U.S.C. § 501(c) provides:

19 If a creditor does not timely file a proof of such
20 creditor's claim, the debtor or the trustee may file
a proof of such claim.

21 ⁶ 11 U.S.C. § 726(a)(3) provides:

22 (a) Except as provided in section 510 of this title,
23 property of the estate shall be distributed ---

24

25 (3) [t]hird, in payment of any allowed
26 unsecured claim proof of which is tardily filed under
section 501(a) of this title, other than a claim of
(continued...)

1 trustee returned any funds to the debtor. Given that the trustee
2 could have filed claims on behalf of the creditors at the time he
3 sent the letter, there was nothing improper about the trustee
4 advising the creditors of their opportunity to file a late claim.

5 Contrary to debtor's assertion, the trustee had no obligation
6 to ask the court to send a surplus asset notice. The language of
7 Local Bankruptcy Rule 3001-1.A.1.d is permissive, not mandatory.
8 The rule allows a trustee to ask for a surplus asset notice; it does
9 not require him to do so. The rule could not have the effect urged
10 by debtor because if it did, it would be contrary to § 501(c) which
11 gives the trustee the authority to file claims on behalf of
12 creditors.

13 Debtor complains that she did not receive notice of the
14 letter. Nothing obligated the trustee to notify debtor of the
15 letter.⁷

16 B. Debtor's Objection to Late-Filed Claims.

17 Debtor's objection to allowance of the late-filed claims is
18 based upon the alleged impropriety of the letter. Having found that
19 the trustee acted properly in sending the letter, overruling the
20 claims objection follows.

22 ⁶(...continued)

23 the kind specified in paragraph (2)(C) of this
24 subsection[.]

25 ⁷ In the notice sent by the court on June 25, 1998 regarding
26 the filing of claims, all interested parties, including debtor, were
notified that there could be distribution to creditors who filed
late claims.

1 Even if I construe debtor's objection to the claims as being
2 based upon the fact that creditors filed them after the deadline,
3 debtor's objection is not well taken. Congress amended the
4 Bankruptcy Code in 1994 to add § 502(b)(9), which deals expressly
5 with the disallowance of a claim on the basis that the claim is
6 filed after the claims bar date. The statute provides:

7 (b) Except as provided in subsections
8 (e)(2), (f), (g), (h) and (i) of this section, if such
9 objection to a claim is made, the court, after notice and
10 a hearing, shall determine the amount of such claim in
11 lawful currency of the United States as of the date of the
12 filing of the petition, and shall allow such claim in such
13 amount except to the extent that ---

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15 (9) proof of such claim is not timely
16 filed, except to the extent tardily filed as
17 permitted under paragraph (1), (2), or (3) of
18 section 726(a) of this title or under the
19 Federal Rules of Bankruptcy Procedure

20 Thus, as the United States Trustee pointed out by in his response to
21 to debtor's objection, "[i]n Chapter 7 cases, the lateness of claims
22 filed after the deadline for filing timely claims affects their
23 distribution priority rather than their allowability. See 11 U.S.C.
24 § 502(b)(9); 11 U.S.C. § 726(a)(3)." (Document 42). The debtor's
25 objection to the late-filed claims is overruled.

26 C. Trustee's Fees.

The trustee has requested \$4,235 in fees and has supported
his request with time records demonstrating that administration of

1 the case will consume 26.10 hours of the trustee's services.⁸
2 Debtor does not challenge the necessity of the services provided by
3 the trustee, the reasonableness of the number of hours worked, or
4 the trustee's claim that \$175 per hour is a reasonable rate of
5 compensation. Debtor argues that the trustee's fees should be
6 limited to the statutory maximum compensation on disbursements of
7 \$8,830, the amount of the timely-filed claims, not to exceed
8 \$2,500.⁹

9 Section 330(a) of the Bankruptcy Code provides that the court
10 may award the trustee reasonable compensation, subject to the
11 limitations of § 326. The pertinent part of § 326 provides that the
12 trustee's compensation shall not exceed the percentages specified of
13 the funds disbursed by the trustee to interested parties other than
14 debtor. Disbursements include payment of administrative expenses
15 plus funds distributed to creditors. In this case, trustee paid
16 \$62,293 in attorney fees and costs related to the claim.¹⁰ Claims
17 filed by unsecured creditors total approximately \$17,000 and will be
18 paid in full. Using just those two numbers, the maximum trustee

20 ⁸ Mr. Eiler has also been employed as attorney for the
21 trustee. He has put debtor and the court on notice that as of
22 February 10, 1999 he had worked 4.5 hours as a lawyer and would
assert a \$787.50 claim for those services.

23 ⁹ The maximum trustee's fee on \$8,830 is \$1,633. See
24 11 U.S.C. § 326(a).

25 ¹⁰ The fact that trustee's attorney, Wilbur Smith, withheld
26 those sums from the settlement check rather than paying them to the
trustee does not make any difference. The trustee constructively
received the \$62,293.

1 compensation exceeds \$7,000.¹¹ The trustee has requested
2 substantially less than the maximum. The debtor's objection to the
3 trustee's fees is not well taken.

4 CONCLUSION

5 Debtor's objections to the trustee's final report, to
6 allowance of late-filed claims, and to the trustee's fee request are
7 overruled. The trustee shall submit the order.

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ELIZABETH L. PERRIS
Bankruptcy Judge

11 cc: Stacie Lee Rovig
12 Kenneth S. Eiler
13 U. S. Trustee
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25 ¹¹ The statutory maximum would also include funds disbursed
26 to the trustee for his fees, thus further increasing the maximum
fee.